Supreme Court U.S.
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No. 01-1394

In The

Supreme Court of the United States

PAULINE COMPANY, INC., and
RABBIT CORPORATION,

Petitioners,

v.

IOWA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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131?

QUESTION PRESENTED

Should not this Court deny certiorari where: (1) the claimed conflict in the circuits arises from a decision of the Ninth Circuit Court of Appeals which represents a clear minority viewpoint, conflicts with the decisions in three federal appellate cases (in one of which, a petition for writ of certiorari has been denied) and has never been endorsed by any other federal appellate court; and (2) where the decision of the Iowa Supreme Court is clearly correct, in that it respects the clear language of the relevant statute and carefully analyzes legislative history?

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SUMMARY OF ARGUMENT

Although petitioners are eager to have a prior decision of this Court declared null and void, other courts have been more reluctant to do so. At least three federal appellate courts, eight federal district courts, and a state appellate court (besides the Iowa Supreme Court) have concluded that this Court's decision in *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) remains good law, notwithstanding the passage of the Civil Rights Act of 1991. This reasoning is sound, because there is nothing in the specific language of the Act which overturns the holding of *Jett*, and because legislative history reveals that the pertinent provision of the Act was designed to affirm the decision of this Court in another case, not overturn the decision in *Jett*. The decision of the Iowa Supreme Court not only reflects the clear majority view, but is also unquestionably correct.

STATEMENT OF THE CASE

The petitioners, Pauline Company, Inc. and Rabbit Corporation, are two minority-owned businesses who brought lawsuits against the Iowa Department of Transportation (DOT) alleging discrimination in numerous construction contracts. Both lawsuits were brought under 42 U.S.C. § 1981 and named only the DOT as defendant.

DOT moved to dismiss both lawsuits, asserting that section 1981 did not provide for a cause of action against state defendants. In their resistance, plaintiffs acknowledged that *Jett v. Dallas Independent School District*, 491

U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) was, if still good law, fatal to their claims, but asserted that it had been legislatively overruled by the Civil Rights Act of 1991.

Jett held that 42 U.S.C. § 1981 did not provide a private cause of action against state actors, since the exclusive remedy against state actors was under 42 U.S.C. § 1983. At the time *Jett* was decided, 42 U.S.C. § 1981 provided:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Interpreting this statute in *Jett*, this Court held that when Congress originally enacted sections 1981 and 1983, it thought that the declaration of rights in section 1981 would be enforced against state actors through the remedial provisions of section 1983. 491 U.S. at 731.

The Civil Rights Act of 1991 amended 42 U.S.C. § 1981 by adding two paragraphs, only the second of which is relevant here. That paragraph provides:

> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State Law.

Pub. L. 102-166, Title 1, § 101 (1991), 105 Stat. 1071. The question, therefore, is whether this new paragraph has the effect of overturning *Jett*.

The district court, in a cursory opinion that cited only the one federal appeals court decision supporting petitioners, and not displaying the reticence a lower state court might feel for declaring a decision of the United States Supreme Court to be null and void, concluded that *Jett* was no longer good law. By contrast, the Iowa Supreme Court, consistent with three federal appellate courts and numerous federal district courts, held that this legislative amendment did not overrule the *Jett* decision. Petition, App. at 1-5.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IN *FEDERATION OF AFRICAN AMERICAN CONTRACTORS v. CITY OF OAKLAND*, RELIED ON BY PETITIONERS AS CREATING A CONFLICT IN THE CIRCUITS, REPRESENTS A DISTINCT MINORITY VIEW; THIS COURT HAS ALREADY DECLINED TO GRANT CERTIORARI ON AT LEAST ONE OTHER CASE CONFLICTING WITH THAT DECISION.

Petitioner argues that the decision of the Iowa Supreme Court conflicts with the decision of the Ninth Circuit Court of Appeals in *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204 (9th Cir. 1996). At the outset, it should be noted that there is no conflict between the results of these cases: in both cases the claim against the governmental entity was dismissed, albeit for

different reasons. Indeed, the only basis for Petitioners' claim that there is an apparent conflict between the Ninth Circuit's decision in *Oakland* and other courts is the discussion in *Oakland* about whether 42 U.S.C. § 1981 provides for a cause of action against state actors. At best, the portion of the Oakland decision discussing this issue represents a distinct minority view. The reasoning of the *Oakland* decision has been rejected in numerous other cases. Three different federal courts of appeals have specifically held that the *Jett* decision has not been overruled by the Civil Rights Act of 1991, and in one of these decisions a petition for writ of certiorari to this Court has been denied. *See Oden v. Oktibbeha County, Mississippi*, 246 F.3d 458, 462-464 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 341, 151 L.Ed.2d 258 (2001); *Butts v. County of Volusia*, 222 F.3d 891, 892-94 (11th Cir. 2000); *Dennis v. County of Fairfax*, 55 F.3d 151, 156 n.1 (4th Cir. 1995).

Moreover, a number of lower federal courts have also specifically concluded that the Civil Rights Act of 1991 did not overrule *Jett*. *See, e.g., Webster v. Fulton County*, 44 F. Supp. 2d 1359 (N.D. Ga. 1999); *Villanueva v. City of Fort Pierce*, 24 F.Supp.2d 1364 (S.D. Fla. 1998); *Tabor v. City of Chicago*, 10 F.Supp.2d 988 (N.D. Ill. 1998); *McPheal v. Board of Commissioners of Madison County*, 976 F.Supp. 1190 (S.D. Ind. 1997); *Reynolds v. Glynn County Board of Education*, 968 F.Supp. 696 (S.D. Ga. 1996); *Ebrahimi v. City of Huntsville Board of Education*, 905 F.Supp. 993 (N.D. Ala. 1995); *Johnson v. City of Fort Lauderdale*, 903 F.Supp. 1520 (S.D. Fla. 1995); *Philippeaux v. North Central Bronx Hospital*, 871 F.Supp. 640 (S.D. N.Y. 1994). At least one state appellate court other than the Iowa Supreme Court has, in a published opinion, also concluded that it was not the intent

of Congress to overrule *Jett*. *Brown v. State of New York*, 89 N.Y.2d 172, 185, 674 N.E.2d 1129, 652 N.Y.S. 2d 223, 231 (1996).

Thus, most courts that have addressed the issue presented by this case have concluded, consistent with the decision of the Iowa Supreme Court, that *Jett* was not overruled by the Civil Rights Act of 1991. As argued next, these decisions are unquestionably correct.

II. THE IOWA SUPREME COURT CORRECTLY DECIDED THIS ISSUE.

A number of factors lead to the conclusion that the decision of the Iowa Supreme court is correct. In particular:

1. *The Amendment to section 1981 is clear and unambiguous.*

There is nothing in the language of 42 U.S.C. § 1981(c) to suggest that Congress wanted to provide a private cause of action against state actors under section 1981. Because "the amendments to section 1981 are facially clear and unambiguous," it "is unnecessary to resort to legislative history" to conclude that it does not allow such a cause of action. *Johnson*, 903 F.Supp. at 1522 n.1. *See also Tabor*, 10 F.Supp.2d at 992 ("The language of section 1981(c) does not explicitly allow plaintiffs a direct cause of action against state actors. The fact that the amendment is facially clear and unambiguous should settle the question.").

2. *Nothing in the Act's legislative history supports petitioners' conclusion.*

Perhaps the most striking feature of the legislative history of the Civil Rights Act is the total absence of any reference to the *Jett* decision. This fact has certainly not been lost on the courts. *Tabor,* 10 F.Supp.2d at 992; *McPheal,* 976 F.Supp. at 1190; *Ebrahimi,* 905 F.Supp. at 995 n.2. As the Iowa Supreme Court noted, the House Committee on the Judiciary explained in its report that the Civil Rights Act of 1991 was enacted in response to a number of decisions of this Court. The report specifically listed ten decisions of this Court which were overruled by the Civil Rights Act of 1991. App. 4-5. *Jett* was not among the decisions listed. App. 5. It seems simply inconceivable that Congress could have intended to overrule the *Jett* decision, and yet not mention this fact when it had a clear opportunity to do so.

3. *The legislative history does establish the purpose of subsection (c).*

While the legislative history accompanying the Civil Rights Act of 1991 does not give any indication that it was the intent of Congress to overturn *Jett,* it does establish an alternative reason for the inclusion of subsection (c). In *Runyon v. McCrary,* 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), this Court held that the rights protected under section 1981 are protected against private discrimination, as well as discrimination by state actors. The intent of subsection (c) is to codify this holding. Indeed, plaintiffs themselves, in their brief to the Iowa

Supreme Court, wrote: "The legislative history surrounding the 1991 Amendment to 42 U.S.C. 1981 does not explicitly announce an intent to create or deny a private right of action against a state actor. . . . Instead, it suggests that Congress' intent in adding this subsection was to codify *Runyon v. McCrary*. . . . The House Committee on the Judiciary explained in its report on the legislation that the Amendment to 1981 was intended to codify *Runyon v. McCrary*, noting further that '[t]he Committee intends to prohibit racial discrimination in all contracts, both public and private.' " Appellee's Brief to the Iowa Supreme Court, page 13.

4. *Petitioners apply an incorrect legal standard.*

Petitioners' argument is based on *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). However, the continued validity of this case is in doubt. *Thompson v. Thompson*, 484 U.S. 174, 188, 108 S.Ct. 513, 98 L.Ed.2d 511, 525 (1988) (Scalia, J., concurring). Even if *Cort* still applies, it is clear that Congressional intent "remains the ultimate issue." *Thompson*, 484 U.S. at 179, 98 L.Ed.2d at 520. Petitioners' discussion of Congressional intent completely ignores the fact that the *Jett* decision addressed that matter and concluded that Congress did *not* intend private and state actors to be treated the same with regard to remedies. Since 42 U.S.C. § 1981(c) does not address remedies at all, it is impossible to discern any intent to alter the holding of *Jett*.

CONCLUSION

It would be inappropriate to grant certiorari on the basis of a conflict created only by one opinion that has been repeatedly rejected by more recent decisions. The decision of the Iowa Supreme Court is correct and should not be disturbed.

Respectfully submitted,

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